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Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1798

PORTER COUNTY CHAPTER OF THE IZAAK WALTON LEAGUE OF AMERICA, INC.; SAVE THE DUNES COUNCIL, INC.; ANN SIMS and HERBERT P. READ,

Petitioners,

v.

DOUGLAS COSTLE, Administrator, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

EDWARD W. OSANN, JR.
One IBM Plaza - Suite 4600
Chicago, Illinois 60611

MARVIN N. BENN
Suite 2222
134 North LaSalle Street
Chicago, Illinois 60602

Attorneys for Petitioners

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on January 30, 1978.

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals are reported at 571 F2d 359, and are reproduced in the Appendix to this Petition at pp. 1-18 and 19-20. The order of the Court of Appeals denying the petition for rehearing is reproduced in the Appendix at p. 21.

The Decision of the General Counsel on Matters of Law Pursuant to 40 C.F.R. Section 125.36(m), No. 42, including Attachment, appears in the Appendix at pp. 22-35. The Administrator's Denial of Petition for Review is reproduced in the Appendix at pp. 36-39.

Permit No. IN 0000132, Authorization to Discharge under the National Pollutant Discharge Elimination System, the final agency decision under review, appears in the Appendix at pp. 40-56.

JURISDICTION

The judgment of the Court of Appeals was entered on January 30, 1978 (App. p. 1). A timely petition for rehearing was denied on March 20, 1978 (App. p. 21). This Court has jurisdiction to review the judgment by Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

A divided court below affirmed the decision of the Administrator of the United States Environmental Protection Agency granting a discharge permit under Section 402 of the Federal Water Pollution Control Act of 1972, as amended,[1] where the Administrator had failed to determine the meaning of a technologically based pollution control standard in Public Law 89-298[2] urged by petitioners to be more stringent than that required by Section 301(b)(1)(A)[3] and therefore binding on the Administrator under Section 301(b)(1)(C),[4] and the court substituted its own judgment for the expertise of the agency by interpreting the meaning of that standard and holding it not binding on the Administrator.

The question presented is whether the court's decision has so far departed from the accepted and usual course of judicial proceedings and the controlling decisions of this Court that review is warranted, especially in view of the ongoing harm to the National Pollutant Discharge Elimination System from the court's error which relieves the Administrator of strict compliance with Section 301(b)(1)(C).

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[1] 33 U.S.C. § 1342.

[2] Act of October 27, 1965, Title III—Rivers and Harbors, § 301; 79 Stat. 1073.

[3] 33 U.S.C. § 1311(b)(1)(A).

[4] 33 U.S.C. § 1311(b)(1)(C).

STATUTES, REGULATIONS, AND EXECUTIVE ORDERS INVOLVED[5]

Federal Water Pollution Control Act, as amended, 33 U.S.C. §§ 1251 et seq.

Public Law 89-298, October 27, 1965, Title III—Rivers and Harbors, Sec. 301; 79 Stat. 1073.

The Refuse Act, 33 U.S.C. § 407.

Executive Order No. 11,574, December 23, 1970, 35 F.R. 19,627—Administration of Refuse Act Permit Program.

Regulations of the Environmental Protection Agency, 40 C.F.R. § 125.36(m).

[5] The relevant provisions of the foregoing, due to their length, are set forth in the statutory Appendix at the end of this Petition.

STATEMENT OF THE CASE

This proceeding was brought under 33 U.S.C. § 1369 and 5 U.S.C. § 701 et seq. to review final orders of the Administrator of the United States Environmental Protection Agency (1) denying review of the General Counsel's decision holding the pollution control standard of Public Law 89-298 inapplicable to effluent limitations in a discharge permit to Northern Indiana Public Service Company (NIPSCO) under Section 402 of the Federal Water Pollution Control Act of 1972, as amended (FWPCA), and (2) granting NIPSCO a Section 402 NPDES permit to discharge pollutants from its coal fired Bailly Generating Station into Lake Michigan at Burns Waterway Harbor adjacent to the Indiana Dunes National Lakeshore without requiring compliance with the standard of Public Law 89-298.

The Agency Proceedings

On October 31, 1974, the U.S. Environmental Protection Agency, Region V, issued an NPDES permit to NIPSCO to discharge pollutants from its coal fired Bailly Generating Station into Lake Michigan at Burns Waterway Harbor, in Porter County, Indiana, adjacent the Indiana Dunes National Lakeshore. At NIPSCO's request, on June 27, 1975 a notice of adjudicatory hearing was issued by EPA Region V to resolve certain questions about the permit. In response to the notice, petitioners filed a request for party status on July 28, 1975 which was approved on August 29, 1975. (App. pp. 2, 3)

As a result of a prehearing conference held November 12, 1975, the Administrative Law Judge certified to the General Counsel of EPA for decision pursuant to 40

C.F.R. § 125.36(m) an issue of law raised by petitioners involving the applicability of the following provision of Public Law 89-298 to the permit:

> ". . . . The State of Indiana shall furnish assurance satisfactory to the Secretary of the Army that water and air pollution sources will be controlled to the maximum extent feasible in order to minimize any adverse effects on public recreational areas in the general vicinity of the Harbor. . . ."

Petitioners contended that this provision set a higher pollution control standard than that proposed by the Administrator for NIPSCO's discharge permit. (App. p. 3). They pointed out that this provision grew out of the compromise in the contest over the use of the shoreline of Lake Michigan near Burns Ditch, Indiana. Industrialists proposed to develop the area as Burns Waterway Harbor. Conservationists sought to expand an existing Indiana State park and include the area in a proposed Indiana Dunes National Lakeshore Park. Between 1963 and 1965, both sides in this "port versus park" controversy compromised and agreed to the development of a public harbor and a national lakeshore. Legislation to this effect was introduced in both houses of Congress in 1965.

The Public Works and Interior Committees of each house held hearings and marked up legislation creating the port and park respectively. The Public Works Committees acted first, each house reporting out a bill authorizing the development of Burns Waterway Harbor. Although these bills did not contain specific language providing for control of pollution in Burns Harbor, they did authorize the development of the harbor under the "direction of the Secretary of the Army" pursuant to House Document 160. This document contained the recommendation of the Secretary of the Army that:

> "* * * the State of Indiana furnish assurances satisfactory to the Secretary of the Army that water and air pollution sources will be controlled to the maximum extent feasible in order to minimize any adverse effects on public recreational areas in the general vicinity of the harbor."

This language was written into the legislation as enacted. (App. pp. 8-10)

On June 9, 1976, the EPA General Counsel handed down a decision to the effect that Public Law 89-298 "has no applicability in establishing effluent limitations for the NPDES permit at issue" (App. pp. 4, 22-25), without a determination of the meaning of the above-quoted "maximum extent feasible" pollution control standard.

On July 6, 1976, petitioners filed a petition to the Administrator for review of the General Counsel's decision. The Administrator denied their petition for review in a decision dated August 10, 1976 (App. pp. 4, 37-40), again without a determination of the meaning of the "maximum extent feasible" standard.

On October 7, 1976, the Regional Administrator issued the initial decision authorizing the issuance of an amended NPDES permit to NIPSCO. The parties also entered into a stipulation at that time which resolved factual issues and preserved legal questions pertaining to Public Law 89-298.

On December 7, 1976, the Administrator, acting through the Director of Enforcement for Region V, formally issued the new NPDES permit to NIPSCO under the same number (No. 0000132) as the previous one. (App. pp. 5, 42-58)

The Proceedings Below

On November 8, 1976, petitioners filed their first petition (No. 76-2093) with the court below for review of the Administrator's August 10, 1976 decision denying review of the General Counsel's decision on Public Law 89-298. On March 7, 1977, petitioners filed their second petition (No. 77-1262) with the court below seeking review of the order of December 7, 1976 issuing the permit. The court ordered consolidation of these two appeals on May 9 and 16, 1977. (App. p. 5)

On January 30, 1978, the court below, by a divided vote, dismissed the petitioners' petition for review and affirmed the decision of the Administrator on Public Law 89-298. (App. 18)

The majority opinion pays lip service to Section 301(b)(1)(C) which provides that there shall be achieved:

> "(C) not later than July 1, 1977, any more stringent limitation including those necessary to meet water quality standards, treatment standards, or schedules of compliance, *established pursuant to any State law or regulations* (under authority preserved by Section 510) *or other Federal law or regulation*, or required to implement any applicable water quality standard established pursuant to this Act." (emphasis supplied)

The majority concedes that "If Public Law 89-298 had provided a precise standard and one more stringent than that required by FWPCA § 301(b)(1)(A), the court would have to direct the Regional Administrator of EPA to heed that stricter standard in the issuance of the permit to NIPSCO". (App. pp. 12, 13) Then, in the absence of a determination by the Administrator as to the meaning of the "maximum extent feasible" pollution control standard, the majority develops its own interpretation. It refuses to direct the Administrator to heed the

standard of Public Law 89-298 on the theory that the law "does not contain a specific standard", "does not confer authority in the Secretary to promulgate such specific standards", and "voices only a broadly stated objective which gives the Secretary . . . authority to exercise his discretion in obtaining assurances from Indiana of 'maximum feasible' pollution control in Burns Harbor". (App. pp. 10-13)

Chief Judge Fairchild, dissenting (App. pp. 19, 20), notes that the EPA considered the language of Public Law 89-298 inapplicable and ambiguous and never determined its meaning. He points out that EPA, without making that determination, cannot fulfill its duty under Section 301(b)(1)(C) to effectuate in Section 402 permits more stringent standards for pollution control, where created by other federal or state statutes, than "best practicable technology". Judge Fairchild would therefore set aside EPA's decision and remand for determination whether the effluent limitations in the permit fulfill the 89-298 language and, if not, for imposition of limitations that would do so.

REASONS FOR GRANTING THE WRIT

I.

THE COURT'S DECISION BELOW HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND THE CONTROLLING DECISIONS OF THIS COURT THAT REVIEW IS WARRANTED.

As Chief Judge Fairchild noted in his dissenting opinion, the court majority below "adopts the view that because the 1965 language (of Public Law 89-298) is ambiguous it is not really a standard capable of enforcement" (App. p. 19) The majority, absent any technical determination by EPA, then goes on to interpret this "ambiguous" standard of "maximum extent feasible" and to hold it no different from the standard applied by EPA in issuing the NIPSCO discharge permit, stating:

> ". . . . We do not perceive that any difference in pollution control would result from enforcement of an objective to control pollution to the 'maximum extent feasible' on one hand and a standard (the standard set out in FWPCA § 301(b)(1)(A)) which establishes the 'maximum level of pollution allowable' on the other. *Thus, application of the objective stated in Public Law 89-298 would not result in the adoption of a standard more stringent than the applicable standards under the FWPCA.*" (emphasis supplied) (App. pp. 17, 18)

It is crystal clear that determination of the meaning of a technical standard such as "maximum extent feasible" is an administrative function involving the expertise of EPA. *American Meat Institute v. EPA*, 526 F.2d 442, 453 (7th Cir. 1975). The majority's intrusion into that determination which the agency alone is authorized to make was reversible error. *F.P.C. v. Idaho Power Co.*, 344 U.S. 20, 21 (1952); *Securities Comm'n. v. Chenery*

Corp., 318 U.S. 80, 88 (1942); *Ford Motor Co. v. Labor Board*, 305 U.S. 364, 373-374 (1939).

Nor can the administrative intrusion of the majority below be justified on the ground that Public Law 89-298 does not confer authority on the Secretary of the Army to promulgate standards, but merely left the matter of pollution control at the Harbor to his discretion (App. pp. 12, 15); and that the law has no application to EPA or to permits under FWPCA. (App. p. 14)

What the majority overlooks is the fact that when Public Law 89-298 was enacted in 1965, and subsequently, the Secretary of the Army already had pollution control authority and the power to issue permits under The Refuse Act (Section 13 of the Rivers and Harbors Act of 1899; 33 U.S.C. § 407). While the Secretary had no formal regulatory permit program, the water quality legislation of 1965 and 1970 limited his authority so as to require compliance with applicable water quality standards. The Refuse Act was upheld in the courts despite the lack of a formal regulatory program. *United States v. Pennsylvania Chem. Corp.*, 411 U.S. 655, 656, 36 L. Ed. 2d 567, 93 S. Ct. 1804 (1973); *United States v. United States Steel Corporation*, 482 F.2d 439 (7th Cir. 1973), cert. denied. 414 U.S. 909.

Executive Order No. 11574, 35 Fed. Reg. 19627 (Dec. 23, 1970) (Stat. App. pp. 15a, 16a) established a formal Section 13 permit program under the Secretary. Section 2 of the Executive Order required the Secretary to consult with the Administrator of EPA respecting "water quality matters", "regulations, procedures, and . . . applications for permits . . ." The Administrator was obligated to "make findings, determinations, and interpretations . . . respecting applicable water quality

standards and compliance with these standards in particular circumstances".[6]

The Executive Order No. 11574 program, with certain changes, was incorporated into § 401 of Public Law 92-500. *United States v. Pennsylvania Chem. Corp., supra.* Under §§ 402(a)(4) and 402(a)(5), all discharge permits issued or pending under Section 13 were deemed issued under § 402 and no new permits under Section 13 were to be issued.

In view of the transition of the discharge permit program directly from the Secretary of the Army to the Administrator of EPA, the authority both shared regarding applicable water quality standards and issuance of permits, and the more stringent limitation requirement of Section 301(b)(1)(C), it is obvious that the majority erred in holding Public Law 89-298 inapplicable to EPA or to permits issued under FWPCA. (App. p. 14)

II.

THE ERROR OF THE COURT BELOW WHICH RELIEVES THE ADMINISTRATOR OF STRICT COMPLIANCE WITH SECTION 301(b)(1)(C) IS A SOURCE OF ONGOING HARM TO THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM.

The Administrator is required under Section 301 FWPCA to establish 1977 and 1983 effluent limitations based primarily on classes and categories of point sources. *E. I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 51 L.Ed. 2d 204, 97 S.Ct. 965 (1977). He is also required under Section 301(b)(1)(C) to condition the NPDES permit upon the discharger's meeting "all applicable requirements under Sections 301", et al. and

[6] EPA had been created by Reorganization Plan No. 3 which became effective December 2, 1970. 35 Fed. Reg. 15623 (1970).

"any more stringent limitation . . . established pursuant to any State law or regulations . . . or other Federal law or regulation . . .". The Administrator is given no authority to set aside or modify such limitations in a permit proceeding. *United States Steel Corp. v. Train*, 556 F.2d 822, 835 (7th Cir. 1977).

The error of the court below relieves the Administrator of strict compliance with Section 301(b)(1)(C) by the simple expedient of not making a determination of a "more stringent limitation" established pursuant to a State or Federal law or regulation. This, we submit, is a source of ongoing harm to the NPDES program and frustration of the Congressional policies set forth in the Act.

CONCLUSION

In view of the ongoing harm to the National Pollutant Discharge Elimination System resulting from the error of the court below, it is submitted that Certiorari should be granted, the decision of the court below reversed, and the cause remanded for such further proceedings as may be appropriate.

Respectfully submitted,

EDWARD W. OSANN, JR.
One IBM Plaza - Suite 4600
Chicago, Illinois 60611

MARVIN N. BENN
Suite 2222
134 North LaSalle Street
Chicago, Illinois 60602

Attorneys for Petitioners

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APPENDIX OF STATUTES, REGULATIONS, AND EXECUTIVE ORDERS

FEDERAL WATER POLLUTION CONTROL ACT, AS AMENDED (33 U.S.C. §§ 1251 et seq.)

§ 1251. Congressional declaration of goals and policy

(a) The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; and

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans.

* * * * *

§ 1311. Effluent limitations—Illegality of pollutant discharges except in compliance with law

(a) Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

Timetable for achievement of objectives

(b) In order to carry out the objective of this chapter there shall be achieved—

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 1314 (d)(1) of this title; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(2)(A) not later than July 1, 1983, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Adninistrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 1317 of this title; and

(B) not later than July 1, 1983, compliance by all publicly owned treatment works with the requirements set forth in section 1281(g)(2)(A) of this title.

Modification of timetable

(c) The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

Review and revision of effluent limitations

(d) Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

All point discharge source application of effluent limitations

(e) Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to all point sources of discharge of polutants in accordance with the provisions of this chapter.

Illegality of discharge of radiological, chemical, or biological warfare agents or high-level radioactive waste

(f) Notwithstanding any other provisions of this chapter it shall be unlawful to discharge any radiological, chemical, or biological warfare agent or high-level radioactive waste into the navigable waters. June 30, 1948, c. 758, Title III, § 301, as added Oct. 18, 1972, Publ.L. 92-500, § 2, 86 Stat. 844.

* * * * *

§ 1342. National pollutant discharge elimination system—Permits for discharge of pollutants

(a)(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title, shall be deemed to be permits issued under this title, and permits issued under this title shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this chapter, to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(h)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator

determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

State permit programs

(b) At any time after the promulgation of the guidelines required by subsection (h)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title, or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require adequate notice to the permitting agency of (A) new introductions into such works of pollutants from

any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

Suspension of federal program upon submission of State program; withdrawal of approval of State program

(c)(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those navigable waters subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(h)(2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314(h)(2) of this title.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

Notification of Administrator

(d)(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

Waiver of notification requirement

(e) In accordance with guidelines promulgated pursuant to subsection (h)(2) of section 1314 of this title, the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

Point source categories

(f) The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

Other regulations for safe transportation, handling, carriage, storage, and stowage of pollutants

(g) Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

Violation of permit conditions; restriction or prohibition upon introduction of pollutant by source not previously utilizing treatment works

(h) In the event any condition of a permit for discharges from a treatment works (as defined in section 1292 of this title) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

Federal enforcement not limited

(i) Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

Public information

(j) A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

Compliance with permits

(k) Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this title, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date of enactment which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

* * * * *

§ 1369. Administrative procedure and judicial review

* * * * *

(b)(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(B)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, or 1316 of this title, and (F) in issuing or denying any permit under section 1342 of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day.

PUBLIC WORKS—RIVERS AND HARBORS

PUBLIC LAW 89-298; 79 STAT. 1073

[S. 2300]

An Act authorizing the construction, repair, and preservation of certain public works on rivers and harbors for navigation, flood control, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

* * * * *

TITLE III—RIVERS AND HARBORS

Sec. 301. The following works of improvement of rivers and harbors and other waterways for navigation, flood control, and other purposes are hereby adopted and authorized to be prosecuted under the direction of the Secretary of the Army and supervision of the Chief of Engineers, in accordance with the plans and subject to the conditions recommended by the Chief of Engineers in the respective reports hereinafter designated. The provisions of section 1 of the River and Harbor Act approved March 2, 1945 (Public Law Numbered 14, Seventy-ninth Congress, first session), shall govern with respect to projects authorized in this title; and the procedures therein set forth with respect to plans, proposals, or reports for works of improvement for navigation or flood control and for irrigation and purposes incidental thereto, shall apply as if herein set forth in full.

NAVIGATION

* * * * *

Burns Waterway Harbor, Indiana: House Document Numbered 160, Eighty-eighth Congress, at an estimated cost of $25,000,000. The Secretary of the Army may reimburse the State of Indiana for the expenditure of funds used to construct such portions of the project as approved by the Chief of Engineers and constructed under the supervision of the Chief of Engineers. Unless construction of the project is initiated within three years

from the date of enactment of this Act, the authority to reimburse the State of Indiana contained in this paragraph shall expire. The State of Indiana shall furnish assurance satisfactory to the Secretary of the Army that water and air pollution sources will be controlled to the maximum extent feasible in order to minimize any adverse effects on public recreational areas in the general vicinity of the Harbor. No appropriation is authorized to be made for the construction of this project until the Indiana Dunes National Lakeshore has been voted upon by both Houses of Congress during the same Congress.
(Reprinted in U.S. Code Cong. and Admin. News, 1965, Vol. 1, 1074, 1093-95)

THE REFUSE ACT

(33 U.S.C. § 407)

§ 407. Deposit of refuse in navigable waters generally

It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided*, That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or con-

struction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further*, That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.
Mar. 3, 1899, c. 425, § 13, 30 Stat. 1152.

EXECUTIVE ORDER No. 11574

December 25, 1970, 35 F.R. 19627

ADMINISTRATION OF REFUSE ACT PERMIT PROGRAM

By virtue of the authority vested in me as President of the United States, and in furtherance of the purposes and policies of section 13 of the Act of March 3, 1899, c. 425, 30 Stat. 1152 (33 U.S.C. 407), the Federal Water Pollution Control Act, as amended (33 U.S.C. 1151 et seq.), the Fish and Wildlife Coordination Act, as amended (16 U.S.C. 661-666c), and the National Environmental Policy Act of 1969 (42 U.S.C. 4321--4347), it is hereby ordered as follows:

Section 1. Refuse Act permit program. The executive branch of the Federal Government shall implement a permit program under the aforesaid section 13 of the Act of March 3, 1899 (hereinafter referred to as "the Act") to regulate the discharge of pollutants and other refuse matter into the navigable waters of the United States or their tributaries and the placing of such matter upon their banks.

Sec. 2. Responsibilities of Federal agencies. (a)(1) The Secretary shall, after consultation with the Administrator respecting water quality matters, issue and amend, as appropriate, regulations,

procedures, and instructions for receiving, processing, and evaluating applications for permits pursuant to the authority of the Act.

(2) The Secretary shall be responsible for granting, denying, conditioning, revoking, or suspending Refuse Act permits. In so doing:

(A) He shall accept findings, determinations, and interpretations which the Administrator shall make respecting applicable water quality standards and compliance with those standards in particular circumstances, including findings, determinations, and interpretations arising from the Administrator's review of State or interstate agency water quality certifications under section 21(b) of the Federal Water Pollution Control Act (84 Stat. 108). A permit shall be denied where the certification prescribed by section 21(b) of the Federal Water Pollution Control Act has been denied, or where issuance would be inconsistent with any finding, determination, or interpretation of the Administrator pertaining to applicable water quality standards and considerations.

(B) In addition, he shall consider factors, other than water quality, which are prescribed by or may be lawfully considered under the Act or other pertinent laws.

(3) The Secretary shall consult with the Secretary of the Interior, with the Secretary of Commerce, with the Administrator, and with the head of the agency exercising administration over the wildlife resources of any affected State, regarding effects on fish and wildlife which are not reflected in water quality considerations, where the discharge for which a permit is sought impounds, diverts, deepends the channel, or otherwise controls or similarly modifies the stream or body of water into which the discharge is made.

(4) Where appropriate for a particular permit application, the Secretary shall perform such consultations respecting environmental amenities and values, other than those specifically referred to in paragraphs (2) and (3) above, as may be required by the National Environmental Policy Act of 1969.

(b) The Attorney General shall conduct the legal proceedings necessary to enforce the act and permits issued pursuant to it.

Sec. 3. Coordination by Council on Environmental Quality. (a) The Council on Environmental Quality shall coordinate the regulations, policies, and procedures of Federal agencies with respect to the Refuse Act permit program.

(b) The Council on Environmental Quality, after consultation with the Secretary, the Administrator, the Secretary of the Interior, the Secretary of Commerce, the Secretary of Agriculture, and the Attorney General, shall from time to time or as directed by the President advise the President respecting the implementation of the Refuse Act permit program, including recommendations regarding any measures which should be taken to improve its administration.

Sec. 4. Definitions. As used in this order, the word "Secretary" means the Secretary of the Army, and the word "Administrator" means the Administrator of the Environmental Protection Agency.

RICHARD NIXON.

THE WHITE HOUSE,
December 23, 1970.

[*Reprinted in U.S. Code Cong. and Admin. News, 1970, Vol. 3, 6305*]

RULES AND REGULATIONS OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY

(40 C.F.R. § 125.36(m)

(m) Decision of the Assistant Administrator for Enforcement and General Counsel on questions of law.

(1) Issues of law, including questions relating to the interpretation of provisions of the Act, and the legality and interpretation of regulations promulgated pursuant to the Act, shall be decided in accordance with this subsection and shall not be considered at the adjudicatory hearing.

(2) The Presiding Officer shall determine which issues, if any, submitted by the parties fall into the category specified in subparagraph (1) of this paragraph, and shall refer such issues to the Assistant Administrator for Enforcement and General Counsel for resolution. Such referral may be accompanied by briefs, filed with the Assistant Administrator for Enforcement and General Counsel within twenty (20) days of the removal of the referred issues from the adjudicatory hearing by the Presiding Officer pursuant to subparagraph (2) of this paragraph. . . . .

* * * * *

(4) The Assistant Administrator for Enforcement and General Counsel shall provide the Regional Administrator, the Presiding Officer, where appropriate, and each party with a written decision with respect to each referred issue of law. A written opinion setting forth the reasons and basis for the decision shall also be provided. The decision of the Assistant Administrator for Enforcement and General Counsel shall be final with respect to each referred issue of law as it relates to the particular permit in question and shall be relied upon by the Regional Administrator in rendering the initial decision.